Supreme Court, U.S.
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In the

Supreme Court of the United States

TERRI A. ALWARD; PATRICIA A. RADER; TRAVIS AYERS; JANE CHARLES; LINDSEY FROUNKELKNER; TIMOTHY GIBBS; DIANA KILSTROM; HOLLY KIRKPATRICK; NORMA KOOTSWATELOA, TRAVIS LOPEZ; R. TODD LUTTON; RONALD MCCULLA; DURRIE A.C. PARKS; ERICA TRENARY; R. JASON URIAS; SOLOMON VON WEIMER; HEIDI YODER; BRIAN E. FINANDER,

Petitioners,

v.

BURRELLE'S INFORMATION SERVICES, a New Jersey limited liability company dba Arizona Clipping Service; ARIZONA CLIPPING SERVICES, an Arizona corporation; JAMES SKOBO, a married man; JANE DOE SKOBO, a married woman,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioners raise and summarize these CONSTITUTIONAL issues to the Court:

[1] Should not the Circuit Court, and the District Court before it, require that there be subject matter jurisdiction over the Respondents AT ALL TIMES during the legal proceedings therein? Should the same be waived or simply ignored by both courts at any and all times in the legal proceedings therein?

[2] Should not a "phantom" Respondent [legally non-existent in the underlying state legal statutory registration scheme] be barred from having ANY federal court consider and /or approve of ANY legal briefs, pleadings or other legal filings on its behalf?

[3] Should not a non-natural [business] entity be required to have legal standing, as evidenced by registration in the underlying state where it has actually opened and operated an ongoing full time business facility, as a predicate for filing any legal briefs, pleadings or other legal filings in U.S. federal courts?

[4] Should not a "phantom" legal entity [insofar as the underlying jurisdiction from which the facts and claims arise is concerned] be declared in full and final default if it refuses, year, after year, after year, after year to registered to do business in the same jurisdiction, but hires attorneys to obtain sanctions against other attorneys who dare to challenge such assertions?

[5] In parallel fashion, *ante*, should not the principle of "fraud upon the court" be extended an/or applied in civil proceedings as well and all subsequent statements, filing, briefs, proposed orders submitted to either the U.S.D.C. or the U.S.C.C.A. be rendered inadmissible and/or null and void, since, as a "house of cards," they fall on top of the already fallen [*infra*] legal foundation, *ante*, herein? There seems to be no precedent for the same in the federal courts; thus, this may be an issue of first impression.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case due to a fundamental error of constitutional law nature in re the ruling dated the 28th of October 2003 [by omission (emphasis added), *i.e.*, the issue not considered at all by the Circuit Court; as such, there is NO reference to these issues in either the Court of Appeals or District Court opinions; thus, those opinions, as written, are NOT relevant to this appeal, except to the omission thereof, which IS the constitutional issue herein].

DECISIONS BELOW

The 1-paragraph Memorandum opinion of the United States Court of Appeal for the Ninth Circuit was not published. It is reprinted at pages 1a through 3a of the Appendix hereto. The order of the District Court from which Petitioners appealed to the United States Court of Appeals for the Ninth Circuit is reprinted at pages 4a through 12a of the Appendix hereto.

JURISDICTION

Judgment of the United States Court of Appeals for the Ninth Circuit was entered on the 28th of October 2003, and not officially published. In the proceedings below, the jurisdiction of the District Court was properly invoked on the basis of the existence of a federal question and deprivation of civil rights pursuant

to Title VII of the Civil Rights Act of 1964, as amended, and the Equal Employment Opportunity Act, as amended. Appeals by Plaintiffs below [Petitioners herein] instead led to the United States Court of Appeals for the Ninth Circuit, affirming a ruling of the U.S.D.C., District of Arizona, in re fees and costs following dismissal of a previous appeal to the Ninth Circuit, 28 U.S.C. 1927. The underlying cause of action is/was an employment law, discrimination and retaliation in re "whistle-blowing" case in the private sector. Jurisdiction herein arises under Federal Question authority, and inherent judicial power of the U.S. federal courts.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST., article III, sec. 2.

Article Three, of the Constitution of the United States provides, in its Second Section, in part, that:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution [and] the laws of the United States...

U.S. CONST., amend. V.

The Fifth Amendment to the Constitution of the United States provides, in part, that:

> No person shall be ... deprived of... property, without due process of law;...

FEDERAL RULES OF CIVIL PROCEDURE, rule 11, sub-part (b).

Rule Eleven of the Federal Rules of Civil Procedure provides, in its second sub-section [sub-section "(b)"] in part, that:

> By presenting to the court .... a pleading ... or other paper, an attorney... is certifying that to the best of the person's knowledge, information, and belief, *formed after an inquiry reasonable under the circumstances*,--- [emphasis added]
>
> (1) it is not being presented for any improper purposes...;
>
> (2) the claims, defense, and other legal contentions therein are warranted by existing law...;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence...

MAJOR SPECIAL NOTE

The legal basis for this Petition involves the LACK OF SUBJECT MATTER JURISDICTION throughout ALL legal proceedings below, and also, FRAUD UPON THE FEDERAL COURTS by Counsels for Respondents who committed provable deceit/fraud in re the most central key issue of the Appeal in their Appellees' Brief in the Circuit Court of Appeals. NEITHER issue was ever addressed by either court at any time in the opinions issued by those courts; as such, the opinions [Orders/Judgments] are attached hereto as required by the rules for this Petition, but the matters discussed in both are completely irrelevant to this Petition, which stands on independent fundamental constitutional grounds.

OTHER PRELIMINARY NOTES/DISCLOSURES

There are ***no*** transcripts in this matter; there were no hearings or oral testimony herein; only the written record of the U.S.D.C., the briefs filed with the 9th Circuit in both prior appeals, and this Petition There are no new documents involved in this Petition known to Petitioners at this time.

STATEMENT OF THE CASE

A. Introduction

The original 18 Petitioners were low-wage [now former] hourly employees of Respondent Arizona Clipping Service ["ACS"] in Phoenix beginning July

1998. The last Appellant was fired by ACS [and its parent, defendant Burrelle's Information Services ("Burrelle's"), a New Jersey limited liability company], at the end of 1999. Defendant James Skobo was a Vice President of Burrelle's who supervised ACS's operations from New Jersey. Appellants are almost all high school drop-outs or high school graduates. These employees were literally paid to clip out and paste articles [etc] from hundreds of newspapers daily for ACS contracted clients.

ACS operated in Arizona, without filing any papers required by state or local authorities, as an unregistered business for 13+ months. In *August 1999*, ACS was quietly incorporated by Burrelle's in Arizona. It has continually been in trouble with the Arizona Corporations Commission ["ACC"] since its first filing. Its parent entity, Burrelle's, has repeatedly refused to file ANY papers to do business in Arizona, even though it has IN FACT ACTUALLY operated a business office in Arizona and paid its employees directly from New Jersey for almost 5-1/2 years now. The 18 original former employee Petitioners were hired or transferred to work for ACS by Respondent Burrelle's only in Phoenix between 1998-1999.

In 1998 and 1999, a number of complaints were made by some of the original Petitioners in re working conditions, discrimination, safety matters, etc., both to management [ACS/Burrelle's], and also, as "whistle-blowing" to various state and local government agencies. This led to Equal Employment Opportunity Commission ["EEOC"] claims against ACS / Burrelle's and then a Complaint and an Amended Complaint in U.S.D.C., District of Arizona in 2000.

B. Legal Proceedings/ Procedural History

Following a series of motions and counter-motions, the District Court dismissed Petitioners' entire Amended Complaint on non-substantive grounds without any hearings or Discovery. An appeal to that dismissal was filed in 2001 and dismissed by the Ninth Circuit Court on other grounds. There then followed post-appeal motions by Respondents' Counsel[s] against Petitioners' Counsel [Brian E. Finander, Esq./the Law Corporation of Brian Finander, P.C.], for costs and fees, per 28 U.S.C.A. 1927, etc.. That appeal was also denied, in October 2003, from which flows this Petition for Writ of Certiorari.

The constitutional issues raised in this Petition are far more fundamental that the narrow limited consideration given to them in the Court of Appeals in their applicability and implications for the operations of our entire federal legal system than just this case --- and has the potential to be precedent-setting in some respects.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH CLEAR DECISIONS OF THIS COURT

The decision of the panel of the United States Court of Appeals for the Ninth Circuit conflicts with many rulings of the United States Supreme Court and the circuit courts as well and "consideration by the United States Supreme Court is therefore necessary to

secure and maintain uniformity of the [federal] courts' decisions" ... because...

II. SUBJECT MATTER JURISDICTION CAN NEVER BE WAIVED AND MUST BE NOTICED *sua sponte* BY ALL FEDERAL COURTS AT ALL POINTS IN THE LITIGATION BY ALL FEDERAL COURTS.

The request for invoking subject matter jurisdiction [i.e., the lack thereof] was specifically noticed by the undersigned to the United States Court of Appeals for the Ninth Circuit, with many, many citations, *infra.* That Court chose to ignore it.

III. THE PETITION INVOLVES ONE OR MORE QUESTIONS OF EXCEPTIONAL CONSTITUTIONAL IMPORTANCE.

The fundamental constitutional issue of lack of standing applies to the entire underlying U.S.D.C. matter in re Respondent Burrelle's, which is a phantom [non-existent] entity insofar as the jurisdictional state [Arizona] statutory corporate recognition authorities are concerned. The failure of the Ninth Circuit Court of Appeals to factor in this issue in its ling, as requested by the Petitioners and/or *sua sponte*, and the fundamental public policy interest for all jurisdictions to uphold, maintain, and require compliance with their statutory corporate registration schemes;

IV. REWARDING RESPONDENT[S] AND THEIR ATTORNEYS FOR COMMITTING A PROVEN [DOCUMENTED] LIE OF MOST MATERIAL CENTRAL FACT [PERJURY] IN THEIR APPELLEE'S BRIEF CANNOT BE IGNORED BY THE FEDERAL COURTS AT ANY TIME.

Petitioners specifically documented the fraud committed by attorneys for Respondents in their "Appellees' [Respondents'] Brief" in this specific appeal to the United States Court of Appeals for the Ninth Circuit. That Court ignored this issue entirely, thus, bringing disrepute on the federal courts themselves for permitting such unethical intentional behavior to go unpunished and/or to be ignored as well; many citations, *infra*, in discussion.

LAW ARGUMENT: DISCUSSION

I. Constitutional Authority: Standing

The cases are legion holding that a party may not waive a defect in subject-matter jurisdiction or invoke federal jurisdiction simply by consent; see, *e.g.*, *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 377, n.21, 98 S.Ct. 2396, 2404, n.21, 57 L.Ed.2d 274 (1978); *Sosna v. Iowa*, 419 U.S. 393, 398, 95 S.Ct. 553, 556, 42 L.Ed.2d 532 (1975); *California v. LaRue*, 409 U.S. 109, 112, n.3, 93 S.Ct. 390, 393, n.3, 341L.Ed2d 342 (1972); *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18, 71 S.Ct. 534, 541-542, and n. 17, 95 L.Ed.702 (1951); *Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S.Ct. 152, 79 L.Ed 338 (1934). This must be so in

cases in which the federal courts are entitle without Article III power to entertain the suit.

> [from U.S. v. Cotton, 535 U.S. 625, 122 S.Ct. 1781, 152 L.Ed2d 860 (2002); (note: this is a criminal case)]

p.630/1785 [Because subject-matter jurisdiction involves a court's power to hear a case, it can never be forfeited or waived. Consequently, defects in subject matter jurisdiction required correction regardless of whether the error was raised in district court [emphasis added]. See., *e.g.*, *Louisville & Nashville R.Co. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908).

> [from dissent in *Freytag v. C.I.R.*, 501 U.S. 868, 896-898, 111 S.Ct. 2631, 2648-2649, 115 L.Ed2d 764 (1991).

For almost 200 years(!), it has been held that an error in subject matter jurisdiction may be raised by a party, and indeed, MUST be noticed *sua sponte* by a court, at ALL points in the litigation [emphasis added]; see, *e.g.*, *American Fire & Casualty Co. v. Finn*, *ante*; *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382, 4 S.Ct. 510, 511, 28 L.Ed. 462 (1884); *Capron v. Van Noorden*, 2 Cranch 126, 127, 2 L.Ed. 229 (1804).

Since such a jurisdictional defects deprives not only the initial court but also all appellate courts the power over the case or controversy, to permit the appellate court to ignore it because of waiver would be to give the waiver legitimating, as opposed to merely remedial, effect; *i.e.*, the effect of approving, *ex ante*,

unlawful action by the appellate court itself. That this, rather any principal of perpetual remediability of structural defects, is the basis for the rule of nonavailability" of lack of subject matter jurisdiction is demonstrated by the fact that a final judgment cannot be attacked *collaterally – i.e.*, before a court that does have jurisdiction --- on the ground that a subject matter jurisdictional limitation (structural or not) was ignored. See, *e.g.*, *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, n.9, 102 S.Ct. 2099, 2164, n.9, L.Ed.492 (1982).

Parties by consent cannot confer on federal courts subject matter jurisdiction beyond the limitations imposed by Article III, #2. *Commidity Futures Trading Commission v. Schor*, 478 U.S. 833, 850-51, 106 S.Ct. 3245, 3256-57, 02 L.Ed.2d 675 (1986) [when these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect] (emphasis added).

> [from *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975)
>
> Hdnt. 1, Federal Courts Key#31 170Bk31 Most Cited Cases (formerly 106k23)

While parties may be permitted to waive nonjurisdictional defects, they may not by stipulation invoke judicial power of United States in litigation which does not present actual "case or controversy." U.S. Const. Art. III, #1, *et seq.*

Sosna involves a durational residency statute for divorce in Iowa. The court discusses at length why the statute is valid, the state's interests that are protected and the widespread practice of states including a residency requirement. The U.S. Supreme Court upheld the residency requirement.

II. States rights to regulate/require compliance to statutory scheme

Arizona has long upheld the validity of its state's statutory scheme regulating business activity in the state; *National Union Indemnity Co. v. Bruce Bros. Inc.*, 44 Ariz. 454, 38 P.2d 648 (1934), [see also, *Capin v. S & H. Packing Co., Inc.*, 130 Ariz. 441, 636 P.2d 1223 (App. 1981)]. Arizona has the right to legislate rules and requirements pertaining to foreign corporations doing business in Arizona or to avail themselves of a forum in Arizona courts, as long as those rules and requirements do not violate the constitution. When the Supreme Court has consider state regulatory statutes, the Court allows the state great discretion in addressing concerns affecting it and its citizens. Absent constitutional prohibitions, those statues with reasonable bases are generally upheld.

Arizona has a strong interest in regulating a foreign corporation's access to Arizona's tribunals and other state benefits. Hence, Arizona established its statutory scheme many years ago and it has been upheld many times. Hdnt 11, Corporations, Key#641, 101k651, Most Cited Cases. Statute declaring acts performed by foreign corporation transacting business in state without complying with statutory requirements to be void held constitutional (Rev. Coded 1928 ##654,

658) [NOTE: predecessor to current/modern statute, A.R.S. 10-1502]

From *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 102 S.Ct. 1137, 71 L.Ed.2d. 250 (1982), from pp. 408/1141. In the absence of a classification that is inherently invidious or that impinges upon fundamental rights, a state statue is to be upheld against equal protection attack if it is rationally related to the achievement of legitimate government ends. *Schweiker v. Wilson*, 450 U.S. 221, 230, 101 S.Ct. 1074, 1080, 67 L.Ed.2e 186 (1981).

From dissent in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 105 S.Ct. 1272 (1985). In reviewing state statutes under the Privileges and Immunities clause of the U.S. Constitution, states should have considerable leeway in analyzing local evils and prescribing appropriate cures. *United Building & Construction Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 223, 104 S.Ct. 1020, 1030, 79 L.Ed.2d 249 (1984).

APPLICATION TO UNDERLYING FACTS HEREIN

Burrelle's is a "phantom" defendant [Respondent] insofar as Arizona is concerned --- even though it has actually hired and paid employees DIRECTLY in Arizona for MORE THAN 5 YEARS [the official certificate of non-registration has already been attached as an exhibit in the underlying appeal in this matter and the prior appeal (other issues) in this matter and is in the office of the Clerk of the United

States Court of Appeals for the Ninth Circuit]. It has factually NEVER been challenged as not accurate by Respondent's attorneys, and thus, the Courts may assume, reasonably, that such a challenge to the truth of the Petitioners' characterization of the same, has been waived. F.R.C.P. 8(d). This includes the fact that Burrelle's has issued payroll checks and year-end W-2 IRS forms to ALL EIGHTEEN (18) Appellants --- ALL OF WHOM LIVED IN ARIZONA at the time of the underlying issues in this case [1998-2001] for work at its working office in Phoenix. However, Burrelle's brazenly and illegally NEVER registered to do business in Arizona. As such, the company does not LEGALLY exist in Arizona. According to Arizona law, a corporation [or limited liability company, similarly] must be properly registered in Arizona in order to avail itself of the public facilities provided for dispute resolution. THIS IS NOT A BURDENSOME TASK. Respondent Burrelle's purports to defend itself here without having registered --- year after year after year after year after year.

The aspect of the case that seems to be one of first impression is that the issues of compliance here is being raised by Petitioners against Respondents. How then, do the courts deal with a DELIBERATELY, SCHEMING "phantom" corporate defendant? To see the case as anything other than a default on the part of the Respondents would run contrary to sound public policy in that it would eviscerate the state's regulatory scheme. This approach would not be countenanced under the 10th Amendment, U.S. Const., and would set a VERY DANGEROUS legal precedent. Because of its LEGAL NON-EXISTENCE, by extension, the Courts

cannot have subject matter over the case waived. It is impossible to EVER waive subject matter jurisdiction.

In addition, right there in black and white on page 13 of Respondents' May 2003 "Appellees' Brief" in the Ninth Circuit Court, Respondents' attorneys stated that Burrelle's does NOT do business in Arizona!!! Petitioners regularly received, every 2 weeks payroll checks and annually received W-2 forms issued by Burrelle's to Petitioners who live and worked for Burrelle's IN ARIZONA. Several of the 18 Petitioners who went to work daily in Phoenix and were paid for it by Burrelle's beginning in 1998 signed sworn statements to the fact that they actually worked in Arizona for Burrelle's at an office in Phoenix, daily!!! ---- which were attached to the appeal in the 9tsh Circuit. Since Burrelle's attorneys signed the Brief, their signatures were LIES OF THE ONE OF THE MOST MATERIAL/KEY/CENTRAL underlying facts in this matter --- and the panel should not have rewarded these lies by ignoring them totally. In fact, the undersigned avers that the Respondents' attorneys herein HAD A DUTY TO NOT REPRESENT A LEGALLY NON-EXISTENT PHANTOM DEFENDANT ON A PHANTOM ISSUE --- AND CONTINUED TO DO SO AND REFUSE TO CORRECT IT/COMPLY WITH ARIZONA LAW THROUGHOUT THIS ENTIRE CASE [emphasis added].

PETITION / PRAYER HEREIN

Petitioners ask this court to:

[A] reverse, *sua sponte* the ruling of the United States Court of Appeals for the Ninth Circuit, and the District Court below, and enter a judgment/default *in toto* against Respondents in the underlying Amended Complaint in U.S.D.C. in favor of Petitioners as has been asked for before, because the Respondents were never LEGALLY in the U.S.D.C. at any time since the case began in 1999 and 2000 --- and Respondents lack of legal standing is far beyond curing, and thus, can be done on these briefs alone;

[B] sanction all of Respondents Attorneys for defrauding federal courts in their Brief IN THE APPEAL in the 9th Circuit, in May 2003 ON A MOST CENTRAL MATERIAL KEY FACT of the entire case

[C] reverse/dismiss ALL sanctions against the undersigned Petitioner Brian E. Finander, Esq., and the Law Corporation of Brian Finander, P.C., of any and all types or kinds of which emanate from any and all legal sources, as it cannot attach from Respondents who do not exist and attorneys who perjure themselves in the Court of Appeals and use both the U.S.D.C. and the Court of Appeals to perpetuate a fraud upon the Federal Courts as part of a scheme to obtain these sanctions against Petitioner Brian E. Finander, Esq.

[D] stay, per F.R.C.A.P. 41(d)(1), the mandate emanating out of or as a consequence of, or as a result

of, the ruling of the United States Court of Appeals for the Ninth Circuit in this matter, pending the outcome of this Petition for Writ of Certiorari.

ALTERNATIVE/SECONDARY PETITION/PRAYER HEREIN

[A] Without waiving or backing away from its Petition/Prayer request as cited in, *ante*, in sub-part [A] therein, that this Court can and should reverse the entire underlying rulings of the U.S.D.C. herein and enter a judgment/default in favor of Petitioners herein for the full amount of their amended Complaint, per a limited purpose, F.R.E. 105, of presenting a secondary Prayer in re that [main] matter, if the Court does not go that far, then, Petitioners Pray that this Court will reverse ALL rulings of the U.S.D.C. and the U.S.C.C.A. for the 9th Circuit in this matter so far and order that the case be remanded to the U.S.D.C. with instructions to begin the underlying case, anew.

[B] without waiving any of Petitioner's Prayer and priority positions in any *ante*, as a last resort, Petitioners ask for a hearing [full briefs and/or oral arguments] in this matter because of the fundamental constitutional issues involved herein.

[C] sub-section "D", *ante*, is re-incorporated here [re stay of mandate].

Respectfully submitted,

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Attorneys for Petitioners

(Any footnotes trail end of each document)

No. 02-16844

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TERRI A. ALWARD; et al.,
Plaintiffs,

v.

BURRELLE'S INFORMATION SERVICES,
a New Jersey limited liability company
dba Arizona Clipping Service; et al.,
Defendants - Appellees,

BRIAN E. FINANDER,
Real-party-in-interest - Appellant.

October 8, 2003 **, Submitted,
San Francisco, California
October 28, 2003, Filed

COUNSEL: For BURRELLE'S INFORMATION SERVICES dba Arizona Clipping Service, ARIZONA CLIPPING SERVICES, JAMES SKOBO, JANE DOE SKOBO, Defendants - Appellees: Jathan W. Janove, Esq., JANOVE BAAR ASSOCIATES, LC, Salt Lake City, UT.

For BURRELLE'S INFORMATION SERVICES dba Arizona Clipping Service, ARIZONA CLIPPING SERVICES, JAMES SKOBO, JANE DOE SKOBO, Defendants - Appellees: Amy Jo Gittler, Esq.,

FRAZER RYAN GOLDBERG ARNOLD & GITTLER.

For BURRELLE'S INFORMATION SERVICES dba Arizona Clipping Service, ARIZONA CLIPPING SERVICES, JAMES SKOBO, JANE DOE SKOBO, Defendants - Appellees: Tricia Brown, FRAZER RYAN GOLDBERG ARNOLD & GITTLER, Phoenix, AZ.

For BRIAN E. FINANDER, Real-party-in-interest-Appellant: Brian E. Finander, Esq., LAW OFFICES OF BRIAN FINANDER, P.C., Phoenix, AZ.

JUDGES: Before: PREGERSON, BEAM, *** and PAEZ, Circuit Judges.

OPINION: MEMORANDUM *

Appellant Brian Finander appeals from the August 9, 2002, district court order awarding fees and costs as sanctions against Appellant and his law firm in the amount of $ 9,476.88. We find no abuse of discretion in the district court's imposition of attorneys' fees and costs in the amount of $ 9,476.88 against counsel Brian E. Finander and the Law Corporation of Brian Finander, P.C., jointly and severally. Patelco Credit Union v. Sahni, 262 F.3d 897, 912-13 (9th Cir. 2001) ("A district court's sanction order is reviewed for abuse of discretion whether imposed pursuant to Rule 11, Rule 37, or 28 U.S.C. § 1927.").

AFFIRMED.

Footnotes

** This panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

*** The Honorable C. Arlen Beam, Senior Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

NO. CIV 00-0365 PHX ROS

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Terri A. Alward, et al.,
Plaintiffs,

vs.

Burelle's Info Services, et al.,
Defendants.

Lodged August7, 2002
Filed August 9, 2002

JUDGMENT

On January 4, 2002, this Court granted defendants' Motion for Attorneys' Fees and Costs in the amount of $5,541.88 as sanctions and on July 24, 2002, this Court granted defendants' Second Motion for Attorneys' fees in the amount of $3,935.00 as sanctions. Accordingly,

Judgment is herby entered against plaintiffs' counsel, Brian E. Finander, and the Law Corporation of Brian Finander, P.C., jointly and severally, and in favor of defendants, in the total amount of $9,476.88.

August 8, 2002.

Honorable Roslyn O. Silver
United States District Judge

LODGED August 7, 2002

And copy mailed to:

Brian E. Finander
Law Office of Brian Finander, P.C.
3131 East Camelback Road, Suite 200
Phoenix, Arizona 85016-4599

Attorney for Plaintiffs

Docket # 02-16844

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Terri A. Alward, et al.,
Appellants,

vs.

Burelle's Info Services, et al.,
Appellees.

ADDITIONAL STATEMENT IN RE EXCERPTS OF RECORD PER CIRC. R. 30-1 SUBJECTION 30.1-3(a)(iv) AS IT APPLIES TO ATTACHED ORDER

Although included herein per requirements of Cir. R. 30.1-3(a)(iv), the substance of said Order is NOT relevant to the resolution to the issues presented by Appellant/Real-Party-in-Interest in this appeal because the substance of the appeal is that ALL of Defendant's and Defendants' Attorneys' filings in the U.S.D.C. were constitutionally defective AB INITIO, and therefore, ALL subsequent proceedings, were/are irrelevant to the resolution of the appeal herein including this Order.

NO. CIV 00-0365 PHX ROS

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Terri A. Alward, et al.,
Plaintiffs,

vs.

Burelle's Info Services, et al.,
Defendants.

ORDER

Pending before the Court is Defendants' Second Motion for Attorneys' Fees Pursuant to 28 U.S.C. § 1927 (Doc. #61). For the reasons set forth below, the Court will grant the motion.

Background

On January 4, 2002, the Court issued an Order (Doc. #60) resolving numerous motions, most of which were contained in Plaintiffs' two "Omnibus Motions" filed on March 22 (Doc. #40) and March 31, 2001 (Doc. #44). The Court denied the various motions contained in Plaintiffs' Omnibus Motions and found that (1) certain statements made in the motions and attachments thereto constituted bad faith, and (2) the imposition of sanctions on Plaintiffs' counsel was appropriate pursuant to 28 U.S.C. § 1927.

In addition, the Court granted Defendants': (1) first Motion For Attorneys' Fees and Costs Pursuant to 28

U.S.C. 1927 (Doc. #37) filed on March 13, 2001 , before Plaintiffs filed their Omnibus Motions; (2) Motion to Seal Plaintiffs' Omnibus Motions (Doc. #46-1) and first Motion for Sanctions (Doc. #46-2) filed on April 9, 2001; and (3) Motion to Seal Second Amended Complaint (Doc. #51-1) and second Motion for Sanctions (Doc. #51-2) filed on April 16, 2001. The Court, however, denied as moot Defendants' request to amend their first Motion for Attorneys' Fees because Defendants had moved for summary disposition of the Motion for Attorneys' Feed. In denying Defendants' request to amend, the Court stated:

Because the Court will grant Defendants' Motion for Summary Disposition for Attorneys' Fees . . . the Court will deny as moot Defendants' Motion to Amend [the] . . . Motion for Attorneys' Fees. This does not, however, preclude Defendants from filing in the future a motion for attorneys' fees in connection with the granting of Defendants' . . . Motion[s] for Sanctions[.]

(1/04/02 Order at 16 n.11) (emphasis added).

Consistent with the Court's Order, Defendants filed the pending Second Motion for Attorneys' Fees Pursuant to 28 U.S.C. § 1927 on January 17, 2002. Attached to the Motion is a supporting Affidavit of Counsel and a detailed Itemization of Fees. (Gittler Aff. & Ex. 1). Plaintiffs did not file an opposition to the Motion. fn1

Discussion

I. LEGAL STANDARD

Under 28 U.S.C. § 1927, "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonable and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonable incurred because of such conduct." In short, "[s]ection 1927 authorizes the imposition of sanctions against any lawyer who wrongfully proliferates litigation proceedings once a case has commenced." Pac. Harbor Capital, Inc. v. Carnival Air Lines, Inc., 210 F.3d 1112, 1117 (9th Cir. 1999). However, sanctions may be imposed under § 1927 only if there has been a determination of bad faith. Id. at 1118. Courts "'assess an attorney's bad faith under a subjective standard. Knowing or reckless conduct meets this standard.'" Id. (citation omitted). fn2

II. ANALYSIS

In its January 4, 2002 Order, the Court granted Defendants' First Motion for Sanctions after determining that Plaintiffs' conduct constituted bad faith:

The Court finds that Plaintiffs have acted in bad faith by filing their First Omnibus Motion which repeats the same scandalous and defamatory material that the Court previously sealed and struck as part of Plaintiffs' proposed Second Amended Complaint filed on December 29, 2000 (Doc. #20). Indeed, this is the third time that the Court has been required to strike scandalous and defamatory material from one of

Plaintiffs' pleadings. (See 12/15/00 Order (Doc. #18) and 2/27/01 Order (Doc. #32)). The Court will therefore allow Defendants to recover attorneys' fees and costs incurred in connection with their Motion to Strike and to Seal. Accordingly, the Court will grant Defendants' First Motion for Sanctions Pursuant to 28 U.S.C. § 1927.

(1/4/02 Order at 15) (emphasis added.) The Court granted Defendants' Second Motion for Sanctions for similar reasons: "The Court finds that Plaintiffs' attachment of the Second Amended Complaint, which previously had been stricken and sealed by the Court, demonstrates bad faith on the part of Plaintiffs. Accordingly, the Court will grant Defendants' Second Motion for Sanctions Pursuant to 28 U.S.C § 1927." (Id. at 17).

In light of these rulings, Defendants filed the pending Second Motion for Attorneys' Fees Pursuant to 28 U.S.C. § 1927. Because section 1927 imposes liability on the offending attorney, not his clients, Defendants "request an award of attorneys' fees against [P]laintiffs' counsel . . . in the total amount of $3,935.00." (Mot. at 3). In her Affidavit, Defendants' counsel states that she spent 7.4 hours and her associate spent 12.7 hours responding to Plaintiffs' Omnibus Motions and preparing Defendants' Motion for Summary Disposition of Defendants' [First] Motion for Attorneys' Fees. (Gittler Aff. ¶¶4). fn3 She further states that she billed her time to Defendants at a rate of $240.00 an hour and her associate's time at $170.00 and hour. (Id. ¶7). Accordingly, "[p]ursuant to 28 U.S.C. § 1927, [D]efendants are applying for $3,935.00 in fees." (Id. ¶9).

Based on the Court's findings and rulings made in the January 4, 2002 Order, Defendants' are entitled to an award of attorneys' fees pursuant to 28 U.S.C. § 1927. Having considered Defendants' Motion, the supporting Affidavit of Counsel, and the Itemization of Fees, the Court finds that (1) the amount of time counsel and her associate spent in responding to Plaintiffs' Omnibus Motions is reasonable, and (2) the hourly rates billed to the Defendants are reasonable in light of counsel's experience, the services performed, and the results obtained. (See Gittler Aff. ¶¶9-10). Accordingly, the Court will grant Defendants' Second Motion for Attorneys' Fees Pursuant to 28 U.S.C. § 1927.

IT IS THEREFORE ORDERED that Defendants' Second Motion for Attorneys' Fees Pursuant to 28 U.S.C. § 1927 (Doc. #61) is GRANTED. Defendants are entitled to recover attorneys' fees in the amount of $3,935.00

DATED this 19 day of July, 2002.

Rosyln O. Silver
United States District Judge

Footnotes

fn1 Rule 1.10(i), Rules of Practice of the United States District Court for the District of Arizona, provides, in pertinent part:

[I]f the opposing party does not serve and file the required answering memoranda . . . such non-compliance may be deemed a consent to the . . .